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IN THE
Supreme Court of the United States
OCTOBER TERM, 1989

JONAS H. WHITMORE, INDIVIDUALLY AND AS NEXT FRIEND OF RONALD GENE SIMMONS,
Petitioner,
v.
STATE OF ARKANSAS, *et al.*,
Respondents.

On Writ of Certiorari to the Supreme Court of Arkansas

MOTION FOR LEAVE TO FILE BRIEF AND BRIEF OF WASHINGTON LEGAL FOUNDATION, PATRICK J. McNULTY, SR., MARJORIE McNULTY, PARENTS OF MURDERED CHILDREN, AND THE ALLIED EDUCATIONAL FOUNDATION AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS

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Pursuant to Rule 36.3 of the rules of this Court, *amici* respectfully move for leave to file the attached brief *amici curiae* in support of respondent. Respondent has consented to the filing of this brief. Petitioner has not.

The Washington Legal Foundation (WLF) is a national non-profit public interest law and policy center with more than 120,000 members and supporters nationwide. While WLF engages in litigation and the administrative process in a variety of areas, it also devotes a substantial amount

of its resources to promoting victims' rights and criminal justice reform. In 1981, WLF published a "Crime Victims Impact Statement" manual to serve as a model guide for implementation at the state level of the use of victim impact information. WLF works with other victims' rights groups, including the *amici* in this case.

Over the last eight years, WLF has also appeared as *amicus curiae* in many death penalty cases before this Court and lower federal courts. *See, e.g., Eddings v. Oklahoma*, 455 U.S. 104 (1982); *McCleskey v. Kemp*, 481 U.S. 279 (1987). WLF also filed *amicus curiae* briefs in the district courts in the Walker spy ring cases, and participated in oral argument in *United States v. Whitworth*, No. CR 85-552 JV (N.D. Cal. 1985), arguing that the federal death penalty for espionage can be constitutionally applied since the federal sentencing procedures meet applicable constitutional requirements.

Amici Patrick J. McNulty, Sr. and Marjorie McNulty are the relatives of four of the fourteen victims murdered by Ronald Gene Simmons. Their son, Dennis R. McNulty, was married to Sheila, the daughter of Ronald Gene Simmons. On December 26, 1987, Dennis drove his wife and their two children, Sylvia, age 6, and Michael, age 21 months, to the Simmons household. Sheila entered the house carrying Michael and put him down by the Christmas tree. Simmons then shot her six times in the head. Dennis, hearing the shots, ran into the house and was shot in the head. Sylvia fled to a bedroom where Simmons strangled her to death with a cord. Michael, too young to flee, was also strangled, and then stuffed in a garbage bag.

The McNultys believe that the death penalty is an appropriate punishment for these murders of their son, daughter-in-law, and grandchildren. They petition the courts not to lose sight of the fact that capital cases involve crushing, irreparable injury for the victims' families as well as the victims themselves. While our legal system remembers the murderer's name in the caption of the case, victims and their families all too often are forgotten. The McNultys further believe that it is an injustice that while the murderer of their loved ones is willing to receive his just punishment, another murderer is attempting to delay the imposition of that sentence and to prevent them from closing this brutal chapter in their lives.

Parents of Murdered Children (POMC), founded by the parents of Lisa Hullinger, who was murdered in 1978, is a national non-profit, self-help support organization based in Cincinnati, Ohio, with chapters nationwide. Besides providing support for grieving parents and family members, POMC provides information about the criminal justice system, and seeks to make the system responsive to the needs of the victim's family.

The Allied Educational Foundation (AEF) is a non-profit, charitable and educational foundation based in Englewood, New Jersey. Founded in 1964, AEF is dedicated to promoting education in diverse areas of study, such as law and public policy, and has appeared as *amicus* before this Court on a number of occasions.

All of the above-named *amici* wish to present a broader perspective on the issues in this case than that offered by the parties. *Amici* believe that their experiences with crime and with the criminal justice system provide a valuable perspective in this case. In particular, *amici* wish to emphasize that our criminal justice system is built on the premises of individual autonomy and individual responsibility and that capital punishment is a communal, moral judgment with deep roots in American law.

For the foregoing reasons, *amici* are in a unique position to aid the Court in its consideration of the issues presented, and their interests are both substantial and different from those of the parties. Accordingly, *amici*

respectfully request that their motion for leave to file an *amici curiae* brief in support of respondent be granted.

Respectfully submitted,

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QUESTIONS PRESENTED FOR REVIEW

1. Whether the Eighth Amendment requires mandatory appellate review of all capital sentences, including those where the capital defendant voluntarily and competently elects not to pursue an appeal?

2. Whether an unrelated third party, who has himself suffered no distinct injury, has standing to allege a violation of constitutional rights when the party most directly affected by the alleged violation elects not to assert those rights?

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED FOR REVIEW	i
TABLE OF AUTHORITIES	iii
INTERESTS OF *AMICI CURIAE*	1
SUMMARY OF ARGUMENT	1
ARGUMENT	5
I. PERMITTING VOLUNTARY AND COMPETENT WAIVERS OF APPELLATE REVIEW OF CAPITAL SENTENCES DOES NOT VIOLATE THE EIGHTH AMENDMENT	5
A. Requiring Mandatory Appellate Review of Capital Sentences Is Inconsistent with Fundamental Notions of Individual Autonomy Embodied in the Bill of Rights	5
B. Permitting Waivers of Appellate Review of Capital Sentences Advances Important State Interests	11
C. Permitting Waivers of Appellate Review of Capital Sentences Does Not Appreciably Impair the Reliability of Capital Sentencing	13
II. THE CONSTITUTIONALITY OF WAIVERS OF APPELLATE REVIEW OF CAPITAL SENTENCES IS NOT ALTERED BY THE CURRENT PRACTICES IN VARIOUS STATES	21
III. PETITIONER LACKS STANDING TO INTERFERE WITH THE ARKANSAS CAPITAL SENTENCING PROCESS	23
CONCLUSION	27

TABLE OF AUTHORITIES

Cases:	Page
**Adams v. United States ex rel. McCann*, 317 U.S. 269 (1942)	*passim*
Barclay v. Florida, 463 U.S. 939 (1983)	18
Barefoot v. Estelle, 463 U.S. 880 (1983)	3, 11
Barrows v. Jackson, 346 U.S. 249 (1953)	26
Bell v. Wolfish, 441 U.S. 520 (1979)	10
Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics, 403 U.S. 388 (1971)	8
Blackledge v. Allison, 431 U.S. 63 (1977)	7, 13
Brady v. United States, 397 U.S. 742 (1970)	13, 19
California v. Brown, 479 U.S. 538 (1987)	18
California v. Ramos, 463 U.S. 992 (1983)	18, 22
Carter v. Illinois, 329 U.S. 173 (1946)	7
CBS v. Democratic National Committee, 412 U.S. 94 (1973)	8, 10
Coker v. Georgia, 433 U.S. 584 (1977)	22
Collins v. State, 261 Ark. 195, 548 S.W.2d 106, *cert. denied*, 434 U.S. 878 (1977)	15, 16
Corbitt v. New Jersey, 439 U.S. 212 (1978)	7
Davis v. Austin, 492 F. Supp. 273 (N.D. Ga. 1980)	25, 27
Diaz v. United States, 223 U.S. 442 (1912)	8
Duncan v. Louisiana, 391 U.S. 145 (1968)	8
Eddings v. Oklahoma, 455 U.S. 104 (1982)	14
Enmund v. Florida, 458 U.S. 782 (1982)	22
Evans v. Bennett, 440 U.S. 1301, *cert. denied*, 440 U.S. 987 (1979)	26
Faretta v. California, 422 U.S. 806 (1975)	2, 6, 7, 21
Flast v. Cohen, 392 U.S. 83 (1968)	24
Franz v. Lockhart, 700 F. Supp. 1005 (E.D. Ark. 1988)	13, 15, 24
Franz v. State, 296 Ark. 181, 754 S.W.2d 839 (1988)	3, 12, 27
Furman v. Georgia, 408 U.S. 238 (1972)	11, 20
Gilmore v. Utah, 429 U.S. 1012 (1976)	15, 25
**Gregg v. Georgia*, 428 U.S. 153 (1976)	*passim*
Hebert v. Louisiana, 272 U.S. 312 (1926)	6
Hewitt v. Helms, 482 U.S. 755 (1987)	10

* Cases chiefly relied upon.

TABLE OF AUTHORITIES—Continued

	Page
Illinois v. Allen, 397 U.S. 337 (1970)	8
Lenhard v. Wolff, 603 F.2d 91 (9th Cir. 1979)	2, 10
Lenhard v. Wolff, 443 U.S. 1306 (1979)	*passim*
Lenhard v. Wolff, 444 U.S. 807 (1979)	25
Linda R.S. v. Richard D., 410 U.S. 614 (1973)	24
Lochner v. New York, 198 U.S. 45 (1905)	22
Lockett v. Ohio, 438 U.S. 586 (1978)	4, 14
**McCleskey v. Kemp*, 481 U.S. 279 (1987)	*passim*
McGautha v. California, 402 U.S. 183 (1971)	16
McKane v. Durston, 153 U.S. 684 (1894)	17
Miranda v. Arizona, 384 U.S. 436 (1966)	7
Murray v. Giarratano, 109 S. Ct. 2765 (1989)	17
North Carolina v. Alford, 400 U.S. 25 (1970)	7, 21
Patton v. United States, 281 U.S. 276 (1930)	7
People v. Deere, 41 Cal. 3d 353, 710 P.2d 925, 222 Cal. Rptr. 13 (1985)	3, 12
People v. Stanworth, 71 Cal. 2d 820, 457 P.2d 889, 80 Cal. Rptr. 49 (1969)	12
Poe v. Ullman, 367 U.S. 497 (1961)	6
Proffitt v. Florida, 428 U.S. 242 (1976)	14, 17
**Pulley v. Harris*, 465 U.S. 37 (1984)	14, 17, 22
Rees v. Peyton, 384 U.S. 312 (1966)	8
Roberts v. United States Jaycees, 468 U.S. 609 (1984)	8
**Ross v. Moffitt*, 417 U.S. 600 (1974)	17
Schlesinger v. Reservists Committee to Stop the War, 418 U.S. 208 (1974)	24
Schneckloth v. Bustamonte, 412 U.S. 218 (1973)	7
Secretary of State v. Joseph H. Munson Co., 467 U.S. 947 (1984)	26
Sierra Club v. Morton, 405 U.S. 727 (1972)	26
Simmons v. State, 298 Ark. 193, 766 S.W.2d 422, *cert. granted, Whitmore v. Arkansas*, 109 S. Ct. 3240 (1989)	25
Simon v. Eastern Kentucky Welfare Rights Organization, 426 U.S. 26 (1976)	23, 24
Singer v. United States, 380 U.S. 24 (1965)	8, 14, 21

* Cases chiefly relied upon.

TABLE OF AUTHORITIES—Continued

	Page
Singleton v. Wulff, 428 U.S. 106 (1976)	25
Smith v. Armontrout, 812 F.2d 1050 (8th Cir.), *cert. denied*, 483 U.S. 1033 (1987)	26
Spaziano v. Florida, 468 U.S. 447 (1984)	20, 22
Sumner v. Shuman, 483 U.S. 66 (1987)	18
Taylor v. United States, 414 U.S. 17 (1973)	8
Thompson v. Oklahoma, 108 S. Ct. 2687 (1988)	22
United States v. Richardson, 418 U.S. 166 (1974)	24
United States v. SCRAP, 412 U.S. 669 (1973)	25
Valley Forge Christian College v. Americans United for Separation of Church & State, Inc., 454 U.S. 464 (1982)	*passim*
Warth v. Seldin, 422 U.S. 490 (1975)	24
Whitmore v. State, 296 Ark. 308, 756 S.W.2d 890 (1988)	23, 24
Whitney v. California, 274 U.S. 357 (1927)	6
Witherspoon v. Illinois, 391 U.S. 510 (1968)	18
Woodson v. North Carolina, 428 U.S. 280 (1976)	14, 19
**Zant v. Stephens*, 462 U.S. 862 (1983)	14, 18

United States Constitution:

Art. III, § 2, cl. 3	*passim*
Amend. VI	*passim*
Amend. VIII	*passim*
Amend. IX	9

Statutory Provisions:

Fed. R. Crim. P. 11	7
Ark. R. Crim. P. 36.1	16
Ark. R. Crim. P. 36.4	16
Ark. R. Crim. P. 37	16
Ark. Code Ann. § 5-4-602 (1987)	15
Ark. Code Ann. § 5-4-603 (1987)	15
Ark. Code Ann. § 5-4-604 (1987)	15
Ark. Code Ann. § 5-4-605 (1987)	15
Ark. Code Ann. § 5-4-608 (1987)	15
Ark. Code Ann. § 5-4-617 (1987)	15
Ark. Code Ann. § 16-90-105 (1987)	16
Ark. Code Ann. § 16-90-105(b) (1987)	16

TABLE OF AUTHORITIES—Continued

	Page
Ark. Code Ann. § 16-90-106(b) (1987)	16
Ark. Code Ann. § 16-90-106(c) (1987)	16
Ark. Code Ann. § 16-90-107(c) (1987)	16

Books:

ABA, *Model Code of Professional Responsibility* (1979)	6
ABA, *Model Rules of Professional Conduct* (1983)	6
ABA, *Standards for Criminal Justice, The Defense Function Standard* (Approved 1979)	6
R. Berger, *Death Penalties: The Supreme Court's Obstacle Course* (1982)	20
J. H. Ely, *Democracy and Distrust* (1980)	22
U.S. Department of Commerce, *Statistical Abstract of the United States 1988*	27

Articles and Miscellaneous:

Dix, *Appellate Review of the Decision to Impose Death*, 68 Geo. L.J. 97 (1979)	18
Dix, *Waiver as an Independent Aspect of Criminal Procedure: Some Comments on Professor Westen's Suggestion*, 1979 Ariz. St. L.J. 67	6
Dix, *Waiver in Criminal Procedure: A Brief For More Careful Analysis*, 55 Tex. L. Rev. 193 (1977)	6
Judicial Conference of the United States, Ad Hoc Committee on Federal Habeas Corpus in Capital Cases, Committee Report and Proposal (Aug. 23, 1989)	11
Rubin, *Toward a General Theory of Waiver*, 28 UCLA L. Rev. 478 (1981)	6
Stephen, *Capital Punishments*, 69 Fraser's Magazine 753 (1864)	11
Urofsky, *A Right to Die: Termination of Appeal For Condemned Prisoners*, 75 J. Crim. L. & Criminology 553 (1984)	12
Weisberg, *Deregulating Death*, 1983 Sup. Ct. Rev. 305	18, 19

TABLE OF AUTHORITIES—Continued

Page

Westen, *Away From Waiver: A Rationale For the Forfeiture of Constitutional Rights in Criminal Procedure*, 75 Mich. L. Rev. 1214 (1977) 6
White, *Defendants Who Elect Execution*, 48 U. Pitt. L. Rev. 853 (1987) ..... *passim*

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INTERESTS OF *AMICI CURIAE*

The interests of the *amici curiae* are set out fully in the Motion for Leave to File accompanying this brief.

SUMMARY OF ARGUMENT

This case presents the question whether the Eighth Amendment requires mandatory appellate review of a capital sentence. As we show below, there is nothing in the Bill of Rights that forces mandatory appellate review upon a capital defendant who voluntarily and competently chooses not to seek it.

Principles of individual autonomy and individual responsibility provide the very foundation of our Republic. "[W]hatever else may be said of those who wrote the Bill of Rights, surely there can be no doubt that they understood the inestimable worth of free choice." *Faretta v. California*, 422 U.S. 806, 833-34 (1975). Consistent with this bedrock principle, the American system of criminal justice has long afforded defendants the freedom—and the responsibility—to make their own decisions about such fundamental issues as pleading guilty and waiving rights to counsel, jury trial, or habeas review.

It would be wholly inconsistent with these basic American values to invoke the Bill of Rights as the basis for dictating mandatory appellate review of capital sentences. Indeed, the Eighth Amendment, like the Constitution's other historic guarantees of personal liberty, was designed to *protect*—not *prohibit*—individual autonomy and freedom. A constitutional requirement of mandatory appellate review would stand the Bill of Rights on its head, turning it from a charter of individual liberties into an instrument of governmental coercion. This Court has long and wisely refused to countenance such a result: "What were contrived [by the Framers] as protections for the accused should not be turned into fetters." *Adams v. United States ex rel. McCann*, 317 U.S. 269, 279-80 (1942). Especially is this so where a capital defendant—whose other freedoms are necessarily subject to the most exacting governmental constraints—makes the intensely personal decision to accept his sentence. "To deny him that would be to incarcerate his spirit—the one thing that remains free and which the state need not and should not imprison." *Lenhard v. Wolff*, 603 F.2d 91, 94 (9th Cir. 1979) (Sneed, J., concurring).

Beyond this, a constitutional requirement of mandatory appellate review would frustrate important State interests, while providing little if any enhancement in the reliability of the capital sentencing process. Both the

State of Arkansas and the families of murder victims have an overriding concern in seeing that criminal punishments are carried out in a prompt and efficient fashion and that the tragic events surrounding murders are finally put to rest. *Barefoot v. Estelle*, 463 U.S. 880, 887-88 (1983); *Lenhard v. Wolff*, 443 U.S. 1306, 1307 (1979) (Rehnquist, J., in chambers). And the State has an equally powerful interest in acknowledging a capital defendant's remorse and his willingness to stand and accept society's punishment. There is nothing in the Eighth Amendment that forbids a state from permitting a waiver of appellate review in order to accommodate what one capital defendant termed his wish to redeem his "last vestige of dignity." *People v. Deere*, 41 Cal. 3d 353, 710 P.2d 925, 929, 222 Cal. Rptr. 13 (1985). As Ronald Gene Simmons said in this case, "I want no action that will delay, deny, defer or denounce this very correct and proper death sentence. . . . [I]n my particular case anything short of death would be cruel and unusual punishment. . . . I only ask for what I deserve." *Franz v. State*, 296 Ark. 181, 754 S.W.2d 839, 844 (1988).

At the same time, permitting waivers of appellate review does not appreciably impair the reliability of capital sentencing. Most importantly, Mr. Simmons' capital sentence was imposed pursuant to an Arkansas statute that afforded all of the trial and sentencing phase protections that this Court found significant in *Gregg v. Georgia*, 428 U.S. 153 (1976), and its subsequent Eighth Amendment decisions. Mandatory appellate review of every capital sentence might theoretically enhance the reliability of the capital sentencing process. But the value of any such enhancement would at best be marginal and uncertain, and clearly would not justify a constitutional requirement of mandatory appellate review.

Initially, the need for mandatory appellate review must be seen in the context of the long-established rule that there is no general constitutional requirement of appel-

late review in criminal cases and this Court's repeated recognition that there is "no perfect procedure for deciding in which cases governmental authority should be used to impose death." *Lockett v. Ohio*, 438 U.S. 586, 605 (1978). Moreover, both commentators and this Court have repeatedly recognized that appellate review of a capital sentence is of inherently limited effectiveness. This is in part because the decision to impose death is ultimately a moral, communal judgment and in part because such decisions rest on consideration of innumerable factors and are not easily susceptible to appellate review. And finally, the likelihood that appellate review will enhance sentencing "reliability" is especially remote in cases like this, where the defendant freely accepts the trial court's sentence and opposes "his" defense counsel.

In the light of all this, it should be clear that the Eighth Amendment does not require a State—and a capital defendant—to forego the significant benefits flowing from waivers of appellate review in exchange for the marginal and uncertain enhancement in reliability offered by mandatory appellate review. Perhaps because the constitutional justifications for the Arkansas capital-sentencing process are so clear, petitioner places principal reliance upon the supposed fact that 36 out of 37 States have rejected Arkansas' approach to waivers of appellate review.

This Court has never accorded significant weight to the mechanical tallying of State laws in the context of Eighth Amendment *procedural safeguards*. This sort of analysis has been confined to cases involving the *substantive restrictions* imposed by the Eighth Amendment. The Court's differing treatment has properly reflected its comparatively greater expertise and competence in the field of procedural fairness and regularity. Nor should the Court undertake any tally of State statutes in this case. Arkansas has adopted an approach to waivers of appellate

review that is not merely fair and reasonable, but which is *more* deferential to individual autonomy than other available approaches. In these circumstances, it would be unprecedented, and troubling, to hold that the entrenched protections in the Bill of Rights for individual freedoms have somehow been superseded by a poll of the statutes currently prevailing in a majority of the several States.

Finally, petitioner Whitmore has failed to advance any colorable claim to standing in this case. The personal injury that Whitmore allegedly suffered because Simmons' crimes were excluded from Arkansas' comparative review process is entirely speculative. And Whitmore's argument that the Court should allow him standing simply because of the societal importance of this case is plainly foreclosed by this Court's precedent. Nor should this Court allow Whitmore standing based on "next friend" or third-party standing theories. Article III's standing requirement would be frustrated by a rule allowing self-appointed next friends to litigate on behalf of competent capital defendants who voluntarily accept their sentences.

I. PERMITTING VOLUNTARY AND COMPETENT WAIVERS OF APPELLATE REVIEW OF CAPITAL SENTENCES DOES NOT VIOLATE THE EIGHTH AMENDMENT.

A. Requiring Mandatory Appellate Review of Capital Sentences Is Inconsistent with Fundamental Notions of Individual Autonomy Embodied in the Bill of Rights.

Principles of individual autonomy, and hence individual responsibility, provide the very basis for both our Constitution and our most cherished social and political institutions. As the Court has observed, "whatever else may be said of those who wrote the Bill of Rights, surely there can be no doubt that they understood the ines-

timable worth of free choice."[1] Or in Justice Harlan's words, "[o]ur Nation [is] built upon postulates of respect for the liberty of the individual."[2]

These historic principles of individual autonomy and responsibility provide the primary rationale for allowing waivers of rights by criminal defendants in countless different contexts.[3] As one commentator has observed, "[d]uring the course of a criminal adjudication, the defendant can be found to have waived virtually any of the procedural protections provided for his benefit."[4] Thus, the Court has held that the Sixth Amendment "does not force a lawyer upon a defendant," reasoning that "[w]hat were contrived [by the Framers] as protections

[1] *Faretta v. California*, 422 U.S. 806, 833 (1975); *Whitney v. California*, 274 U.S. 357, 375 (1927) ("Those who won our independence . . .valued liberty both as an end and as a means.").

[2] *Poe v. Ullman*, 367 U.S. 497, 542 (1961) (Harlan, J., dissenting). *See also Hebert v. Louisiana*, 272 U.S. 312, 316 (1926) ("fundamental principles of liberty and justice which lie at the base of all our civil and political institutions . . . ").

[3] *See* Dix, *Waiver in Criminal Procedure: A Brief for More Careful Analysis*, 55 Tex. L. Rev. 193, 219 (1977) ("an important aspect—perhaps the essence—of the dignity of the individual is his ability to control his own destiny"); Rubin, *Toward a General Theory of Waiver*, 28 UCLA L. Rev. 478, 488-89 & n.55 (1981) ("a waiver is a choice"); Dix, *Waiver as an Independent Aspect of Criminal Procedure: Some Comments on Professor Westen's Suggestion*, 1979 Ariz. St. L.J. 67, 76-77; Westen, *Away From Waiver: A Rationale For the Forfeiture of Constitutional Rights in Criminal Procedure*, 75 Mich. L. Rev. 1214, 1255 (1977) ("waiver is thought to be based . . . on a concept of free choice"). *See also Adams v. United States ex rel. McCann*, 317 U.S. 269, 276-80 (1942); *Faretta* 422 U.S. at 834 n.45 ("Freedom of choice is not a stranger to the constitutional design of procedural protections for a defendant in a criminal proceeding.").

[4] Rubin, *supra* at 478. *See also* ABA, *Standards for Criminal Justice, The Defense Function Standard* 4-3.1(b) & 4-5.2 (Approved 1979); ABA, *Model Code of Professional Responsibility* EC 7-7 (1979); ABA, *Model Rules of Professional Conduct* Rule 1.2 (1983).

for the accused should not be turned into fetters."[5] Similarly, it is well-established that the Constitution does not prohibit a defendant—including a capital defendant—from pleading guilty.[6] And nothing in the Constitution forbids waivers—including in capital cases—of Fourth Amendment rights,[7] Fifth Amendment rights,[8] the right to a jury trial,[9] the right to confront one's accus-

[5] *E.g., Adams*, 317 U.S. at 279. *See also Carter v. Illinois*, 329 U.S. 173, 174-175 (1946); *Faretta*, 422 U.S. at 807.

[6] *E.g.*, Fed. R. Crim. P. 11; *Corbitt v. New Jersey*, 439 U.S. 212, 225 n.15 (1978); *Blackledge v. Allison*, 431 U.S. 63, 71 (1977).

The Court has repeatedly emphasized the wide discretion of the States to permit (or forbid) the making of guilty pleas. Thus, in *North Carolina v. Alford*, 400 U.S. 25, 37-39 (1970), the Court held that the validity of a voluntary and competent guilty plea could not be "seriously questioned," even where the defendant professed belief in his innocence. The *Alford* Court relied on the fact that the defendant, while claiming innocence, also provided a factual basis for his plea. *Id.* at 38.

Petitioner's reliance upon *Alford's* reference to a factual basis for a guilty plea is misplaced. First, it is by no means clear that *Alford's* observation about a factual basis amounts to a constitutional requirement. Second, and more importantly, any analogous "factual basis" requirement for waivers of appellate review of capital sentences is plainly satisfied in this case. After all, an Arkansas sentencing jury and trial judge pronounced defendant's sentence following a presumptively valid proceeding pursuant to a constitutional capital sentencing scheme. *See infra* pp. 15-16. And, of course, the defendant himself has clearly endorsed this judgment. *See also* White, *Defendants Who Elect Execution*, 48 U. Pitt. L. Rev. 853, 864-65 (1987).

[7] *E.g., Schneckloth v. Bustamonte*, 412 U.S. 218, 227 (1973).

[8] *E.g., Miranda v. Arizona*, 384 U.S. 436, 475 (1966).

[9] This Court has squarely held that the Sixth Amendment does not itself forbid waiver of a jury trial by a criminal defendant. *See Adams*, 317 U.S. at 277-78; *Patton v. United States*, 281 U.S. 276 (1930). Indeed, this result has long been established notwithstanding the literal language of Article III, § 2, cl. 3 that "The Trial of all Crimes, except in Cases of Impeachment, *shall* be by

ers,[10] or the right to habeas review.[11]

Although there are instances in which particular *statutes* or *rules* restrict waivers of particular rights by criminal defendants, it would be unprecedented to interpret the *Bill of Rights* to deny a defendant the otherwise available freedom to waive a procedural protection. The Bill of Rights was adopted as a charter of liberties, designed to guarantee individual freedoms against governmental intrusion. As Justice Douglas once observed, "[t]he struggle for liberty has been a struggle against Government. The essential scheme of our Constitution and Bill of Rights was to take Government off the backs of people." [12]

The Bill of Rights has never been thought to provide a mechanism for compelling individuals to act in the in-

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Jury." U.S. Const. art. III, § 2, cl. 3 (emphasis added). *See also Duncan v. Louisiana*, 391 U.S. 145, 158 (1968).

Petitioner mistakenly relies upon *Singer v. United States*, 380 U.S. 24 (1965), in arguing that the Constitution forbids various waivers by criminal defendants. In *Singer*, the Court reasoned that nothing in the Constitution guarantees a criminal defendant the right to trial by a judge and that "[t]he ability to waive a constitutional right does not ordinarily carry with it the right to insist upon the opposite of that right." *Id.* at 34-35. *Singer* stands only for the proposition that both the prosecution and trial court have rights—which are not the defendant's to waive—to insist upon a jury trial. *Id.* at 36.

[10] *Taylor v. United States*, 414 U.S. 17, 19 (1973); *Illinois v. Allen*, 397 U.S. 337, 343 (1970); *Diaz v. United States*, 223 U.S. 442, 450-51 (1912).

[11] *Rees v. Peyton*, 384 U.S. 312 (1966).

[12] *CBS v. Democratic Nat'l Comm.*, 412 U.S. 94, 164 (1973) (Douglas, J., concurring). *See also Roberts v. United States Jaycees*, 468 U.S. 609, 618 (1984) ("the Bill of Rights is designed to secure individual liberty"); *Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics*, 403 U.S. 388, 407 (1971) (Harlan, J., concurring) ("the Bill of Rights is particularly intended to vindicate the interests of the individual in the face of the popular will as expressed in legislative majorities").

terests of the State.[13] The Court made precisely this point in holding that the Sixth Amendment forces neither a lawyer nor a jury trial upon a defendant:

> *It hardly occurred to the framers of the . . . Bill of Rights that an accused, acting in obedience to the dictates of self-interest or the promptings of conscience, should be prevented from surrendering his liberty by admitting his guilt* . . . [W]e are asked here to hold that an accused person cannot waive trial by jury . . . unless he acts on a lawyer's advice. . . . [*T*]*he Constitution does not force a lawyer upon a defendant. He may waive his Constitutional right to assistance of counsel if . . . his choice is made with eyes open.* . . . When the administration of the criminal law . . . is hedged about as it is by the Constitutional safeguards for the protection of an accused, *to deny him in the exercise of his free choice the right to dispense with some of these safeguards . . . is to imprison a man in his privileges and call it the Constitution.*[14]

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[13] Petitioner consistently fails to distinguish between decisions reasoning that *state laws* prohibit waivers and contentions that the *Bill of Rights* prohibits a waiver. Thus, petitioner asks whether the "police power of the state to protect its citizens from self-destructive acts can subjugate the individual rights of the citizen." Brief for Petitioner at 18. Petitioner answers in the affirmative, reasoning that the police power of the several States allows them to "control[] many aspects of our daily lives from the speed at which we drive or whether motorcyclists wear helmets to weightier issues of compelled blood transfusions." *Id.* Petitioner's argument ignores the fundamental point that it is not the Bill of Rights, interpreted by the federal courts, that imposes speed limits, motorcycle helmet requirements or blood transfusions. It is the several States, subject to the limits of the United States Constitution, that regulate these activities.

[14] *Adams*, 317 U.S. at 276-79 (emphasis added). *See also* U.S. Const. amend. IX ("The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people.").

Or, as then Chief Justice Burger reasoned in holding that the First Amendment does not require public broadcasters to accept certain types of material:

Indeed, there are especially compelling reasons that the Bill of Rights ought not forbid a defendant's waiver of appellate review of his own death sentence. Deciding whether to resist the death penalty, and if so how, are intensely personal decisions; they implicate what is literally the very existence of the capital defendant. Moreover, by virtue of their crimes, capital defendants place themselves into the uniquely restrictive environment of death row, where they are permitted only the most limited freedoms.[15] Within this context, it is all the more important that the Bill of Rights not be understood to forbid a capital defendant the liberty to stand and face his sentence. Judge Sneed put the matter well in *Lenhard v. Wolff*, 603 F.2d at 94 (Sneed, J., concurring):

> [The defendant] is an individual who, for reasons I can fathom only slightly, has chosen to forego his federal remedies. Assuming his competence . . . he should be free to so choose. To deny him that would be to incarcerate his spirit—the one thing that remains free and which the State need not and should not imprison.

In short, invoking the Eighth Amendment to require mandatory appellate review of all capital sentences stands the Bill of Rights on its head, turning a charter for in-

> [I]t would be anomalous for us to hold, in the name of promoting the constitutional guarantees of free expression, that the day-to-day editorial decisions of broadcast licenses are subject to the kind of restraints urged by respondents. *To do so in the name of the First Amendment would be a contradiction.*

CBS v. Democratic Nat'l Comm., 412 U.S. 94 (Burger, C.J., plurality opinion) (emphasis added). *See also id.* at 139 (Stewart, J., concurring) ("The First Amendment protects the press *from* governmental interference; it confers no analogous protections *on* the Government.") (emphasis in original); *id.* at 162 (Douglas, J., concurring).

[15] *Cf. Hewitt v. Helms*, 482 U.S. 755 (1987); *Bell v. Wolfish*, 441 U.S. 520, 545-46 (1979).

dividual liberties into an instrument of governmental coercion. Such a result ought not lightly be reached and, as we show below, petitioner's arguments fall far short of justifying any such novel reading of the Eighth Amendment. Indeed, mandatory appellate review of capital sentences would frustrate important governmental interests, while offering only marginal and uncertain enhancements in the reliability of capital sentencing.

B. Permitting Waivers of Appellate Review of Capital Sentences Advances Important State Interests.

By permitting capital defendants to waive appellate review of their sentences, a State advances a number of vital interests. First, waivers of appellate review facilitate the prompt execution of capital sentences. The importance of this interest to the States has frequently been emphasized.[16] And of course, the families and loved ones of those who die by violent crime—like the McNultys in this case—have a compelling interest in finally laying to rest the tragic events surrounding a murder.

Second, permitting waivers of appellate review enables a State tangibly to acknowledge a capital defendant's expressions of remorse and his acceptance of society's punishment. It is of course undeniable that the brutal atrocities committed by capital defendants must ultimately set them apart from civilized society: "When a man is hung, there is an end to our relations with him. His execution is a way of saying 'You are not fit for this world, take your chance elsewhere.' " [17]

Nevertheless, a State may quite properly allow a defendant to accept his punishment in an effort to redeem

[16] *E.g., Barefoot v. Estelle*, 463 U.S. 880, 887-88 (1983); *Lenhard v. Wolff*, 443 U.S. 1306, 1307 (1979) (Rehnquist, J., in chambers). *See also* Judicial Conference of the United States, Ad Hoc Comm. on Fed. Habeas Corpus In Capital Cases, Comm. Rep. and Proposal at 1, 7 (Aug. 23, 1989).

[17] *Furman v. Georgia*, 408 U.S. 238, 290 (1972) (Brennan, J., concurring) (quoting Stephen, *Capital Punishments*, 69 Fraser's Magazine 753, 763 (1864)).

what one capital defendant termed his "last vestige of dignity." [18] Some capital defendants—like Ronald Gene Simmons in this case—eventually come to express remorse for their crimes and acceptance for their sentences. In the proceedings below, Simmons said "I want no action that will delay, deny, defer or denounce this very correct and proper death sentence. . . . [I]n my particular case anything short of death would be cruel and unusual punishment . . . I only ask for what I deserve." *Franz v. State*, 754 S.W.2d at 844. Similarly, in a California case, the defendant's lawyer asked, "What can [the defendant] say to . . . what's left of the family of his victims. He virtually wiped out a family, a father and two small children. . . . The only thing he can do is to say 'I accept full responsibility for what I did.'" [19]

There is no reason to ignore voluntary expressions of culpability by capital defendants, nor to treat them as the somehow inherently unreliable products of disturbed minds.[20] On the contrary, we should welcome a brutal

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[18] *People v. Deere*, 710 P.2d at 929. *See also* Urofsky, *A Right to Die: Termination of Appeal For Condemned Prisoners*, 75 J. Crim. L. & Criminology 553, 554 (1984) (quoting Gary Gilmore: "when I accept this most extreme punishment with grace and dignity, you, the people of Utah want to back down and argue with me about it").

[19] *People v. Deere*, 710 P.2d at 929. *See also People v. Stanworth*, 71 Cal. 2d 820, 457 P.2d 889, 896 n.13, 80 Cal. Rptr. 49 (1969) ("I and I alone must suffer for my acts and I understand also that the law holds me to task for my actions.").

[20] The premise for waivers of appellate review of capital sentences is, of course, an affirmative showing of the competence of the defendant and the voluntariness of his waiver. *Franz v. State*, 296 Ark. 181, 754 S.W.2d 839 (1988); White, *supra* at 867. As the Arkansas Supreme Court concluded, a proper inquiry into the defendant's competence examines whether the defendant has "the capacity to understand the choice between life and death and to knowingly and intelligently waive any and all rights to appeal his sentence." *Franz v. State*, 754 S.W.2d at 843. The standard properly focuses upon the character of the defendant's waiver and the

killer's ultimate realization of the enormity of his crimes and his acceptance of society's judgment. As the Court has held in the guilty plea context, there is an independent value in giving the defendant "the chance to acknowledge his guilt" and promptly face his punishment.[21]

C. Permitting Waivers of Appellate Review of Capital Sentences Does Not Appreciably Impair the Reliability of Capital Sentencing.

Petitioner devotes considerable effort to showing that the lack of mandatory appellate review unacceptably compromises the reliability of capital sentencing procedures.[22] Since *Gregg v. Georgia*, 428 U.S. 153 (1976), the Court has discerned various principles of procedural regularity in the Eighth Amendment's prohibition against "cruel and unusual" punishments. These principles have required, first, that sentencing authorities not be permitted unbridled discretion in imposing capital sentences, but that they instead be provided with legislative direction that

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likely consequences of his choice, as well as upon the possible effects of death row confinement upon the voluntariness of the defendant's decision. *See White, supra* at 867-68.

[21] *Blackledge v. Allison*, 431 U.S. at 71. *See Brady v. United States*, 397 U.S. 742, 748 (1970).

[22] There is no reason in this case to consider the district court's rhetorical hypothetical: "If a state court sentenced a defendant to be boiled in oil, and the defendant, for whatever reason, declined to object, would a horrified nation be forced to stand by while the sentence was carried out?" *Franz v. Lockhart*, 700 F. Supp. 1005, 1023 (E.D. Ark. 1988). Even assuming that such a decision would ever be competently and voluntarily made, it is clear that the balance of State interests and Eighth Amendment concerns in the district court's hypothetical is entirely divorced from that in the present case. Here, unlike the hypothetical, a substantively permissible punishment is to be carried out following a sentencing proceeding pursuant to a state statute that afforded all of the trial and sentencing phase protections required by the Eighth Amendment. Thus, the defendant's waiver advances entirely legitimate State interests and, as we explain below, *infra* pp. 13-19, does not appreciably impact upon Eighth Amendment concerns about procedural regularity or substantively permissible punishments.

prevents arbitrary or freakish imposition of capital sentences.[23] And second, the Eighth Amendment has also been understood to guarantee a capital defendant's right to introduce mitigating evidence regarding his character at the sentencing phase.[24] These general principles have been reflected in a variety of specific procedural safeguards, including bifurcated guilt-sentencing procedures,[25] statutory enumeration of aggravating and mitigating circumstances,[26] and broad scope for the submission of mitigating evidence.[27]

Importantly, the various procedural safeguards adopted in *Gregg* and its progeny have never been viewed as ends unto themselves. They have instead served as means of avoiding "arbitrary" or "freakish" decisions whether "death is the appropriate punishment in a specific case." *Woodson v. North Carolina*, 428 U.S. 280, 305 (1976). Moreover, this Court has repeatedly recognized that "[a]ny capital sentencing scheme may occasionally produce aberrational outcomes." [28] Viewed in this context,

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[23] *Pulley v. Harris*, 465 U.S. 37, 45 (1984); *Gregg v. Georgia*, 428 U.S. at 206-07 (plurality opinion of Justices Stewart, Powell, and Stevens), 220-21 (White, J., concurring).

[24] *Lockett v. Ohio*, 438 U.S. 586, 604 (1978); *Eddings v. Oklahoma*, 455 U.S. 104, 110 (1982).

[25] *Gregg v. Georgia*, 428 U.S. 153; *Proffitt v. Florida*, 428 U.S. 242 (1976).

[26] *Gregg v. Georgia*, 428 U.S. 153; *Proffitt v. Florida*, 428 U.S. 242.

[27] *Lockett v. Ohio*, 438 U.S. 586; *Eddings v. Oklahoma*, 455 U.S. 104.

[28] *Pulley v. Harris*, 465 U.S. at 54. *See McCleskey v. Kemp*, 481 U.S. 279, 307 n.28, 313 (1987) (quoting *Singer v. United States*, 380 U.S. at 35) ("The Constitution is not offended by inconsistency in results based on the objective circumstances on the crime"; "any mode for determining guilt or punishment 'has its weaknesses and the potential for misuse'"); *Lockett v. Ohio*, 438 U.S. at 605 ("There is no perfect procedure for deciding in which cases governmental authority should be used to impose death."); *Zant v. Stephens*, 462 U.S. 862, 885 (1983) ("not every imperfection in the deliberative process is sufficient, even in a capital case, to set aside a state-court judgment.").

it is clear that permitting waivers of appellate review does not unacceptably impair the reliability of capital sentencing.

First, the capital sentence in this case was imposed pursuant to a procedure that—apart from the issue of appellate review—manifestly exceeds the requirements of *Gregg* and its progeny.[29] Under the Arkansas capital sentencing statute—which has been repeatedly upheld against Eighth Amendment challenges—a death sentence may be imposed only by a jury after a bifurcated trial at which guilt and sentencing are considered separately. Ark. Code Ann. § 5-4-602 (1987). Only defendants found guilty of capital murder are potentially subject to the death penalty. Ark. Code Ann. § 5-4-608 (1987). The jury hears evidence concerning both mitigating and aggravating circumstances, which are statutorily defined in order to channel the jury's discretion. Ark. Code Ann. § 5-4-604 (1987). The defendant, of course, can present a broad range of evidence in mitigation. Ark. Code Ann. §§ 5-4-602(4) & 5-4-605. The jury may impose the death sentence only if it unanimously returns written findings that specific aggravating circumstances existed beyond a reasonable doubt, that these aggravating circumstances outweigh any mitigating circumstances beyond a reasonable doubt, and that the aggravating circumstances justify a sentence of death beyond a reasonable doubt. Ark. Ann. Code § 5-4-603 (1987).

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[29] The Arkansas laws establishing procedural requirements for capital sentencing reside in §§ 5-4-601 through 5-4-617 of the Arkansas Code. Ark. Code Ann. § 5-4-617 (1987). These capital sentencing provisions have been repeatedly upheld against constitutional challenge. *Collins v. State*, 261 Ark. 195, 548 S.W.2d 106 (en banc), *cert. denied*, 434 U.S. 878 (1977); *Franz v. State*, 754 S.W.2d 839. Thus, this case does not implicate the concerns raised by Justice White's dissent in *Gilmore v. Utah*, 429 U.S. 1012, 1018 (1976), where "the state courts [had not] resolved the obvious, serious doubts about the validity of the [Utah] Statute." *Id.* at 1018 (White, J., dissenting).

"The trial judge is not required to impose the death penalty in every case in which the jury verdict prescribes it." *Collins v. State*, 261 Ark. 195, 548 S.W.2d 106, *cert. denied*, 434 U.S. 878 (1977). *See* Ark. Code Ann. § 16-90-107(c) (1987). For up to thirty days following the verdict, information relevant to the appropriateness of the sentence may be presented to and considered by the court. Ark. Code Ann. § 16-90-105(b) (1987). When the defendant appears for sentencing, the court must ask him whether he has any legal reason why sentence should not be pronounced against him. Ark. Code Ann. § 16-90-106(b) (1987). The defendant then has an opportunity to present any grounds he may have for a new trial or arrest of judgment. Ark. Code Ann. § 16-90-106(c) (1987). Even after the sentencing phase of the trial has passed, the court may make any additional reviews of constitutional objections to the death penalty under Rule 37 of the Arkansas Rules of Criminal Procedure providing for post-conviction relief.[30]

In short, the trial and sentencing phases of the Arkansas statute are fully consistent with this Court's decisions in *Gregg* and its progeny. And of course, any capital sentence is imposed by a jury of the defendant's peers, and adopted by a judge, both cognizant of the "truly awesome responsibility of decreeing death for a fellow human." *McGautha v. California*, 402 U.S. 183, 208 (1971). As a result, there is scant reason for believing that capital sentences imposed by Arkansas sentencing juries and judges will be "freakish" or "arbitrary."

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[30] In addition, Rule 36.1 of the Arkansas Rules of Criminal Procedure provides that "[a]ny person convicted of a misdemeanor or felony by virtue of a trial in any circuit court in this state has the right to appeal to the Arkansas Court of Appeals or to the Supreme Court of Arkansas." The defendant must be informed of this right when the sentence is announced and judgment entered. Ark. Code Ann. § 16-90-105 (1987). Rule 36.4 requires the Arkansas Supreme Court to review the entire record for any errors prejudicial to the appellant's right, where either a capital sentence or imprisonment for life has been imposed.

Second, while requiring that appeals be taken in all capital cases might theoretically enhance the reliability of Arkansas' capital sentencing process, any such enhancement would at best be both marginal and uncertain. This Court has long recognized the general rule that nothing in the Constitution requires a right of appeal in criminal cases.[31] It is true that the Court has quite explicitly acknowledged the availability of appellate review as one of many factors that contribute to the constitutionality of contemporary capital sentencing procedures.[32] Nonetheless, the Court has been equally clear in leaving open the question whether even the availability of appellate review is constitutionally required.[33] And just last Term, in *Murray v. Giarratano*, 109 S. Ct. 2765, 2769 (1989), the Court expressly recognized that the trial phase of the capital sentencing process provides our principal assurance of procedural regularity. As Chief Justice Rehnquist put it, "[t]he additional safeguards imposed by the Eighth Amendment at the trial stage of a capital case are, we think, sufficient to assure the reliability of the process by which the death penalty is imposed." [34]

The need for and efficacy of appellate review of capital sentences is limited because of the character of the sen-

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[31] *See Ross v. Moffitt*, 417 U.S. 600, 611 (1974); *McKane v. Durston*, 153 U.S. 684, 687-88 (1894) ("A review by an appellate court of the final judgment in a criminal case, however grave the offense of which the accused is convicted, was not at common law and is not now a necessary element of due process of law.").

[32] *E.g., Gregg v. Georgia*, 428 U.S. at 206-07 (plurality opinion of Justices Stewart, Powell, and Stevens).

[33] *Compare Pulley v. Harris*, 465 U.S. at 47 *with id.* at 54 (Stevens, J., concurring) (Eighth Amendment requires "meaningful appellate review"). *See also Proffitt v. Florida*, 428 U.S. at 260-61 (Stewart, J., concurring). In *Pulley v. Harris*, the Court held that there is no Eighth Amendment requirement for proportionality review—which constitutes a principal feature of most mandatory appellate review statutes. *Pulley v. Harris*, 465 U.S. at 47.

[34] *Murray v. Giarratano*, 109 S. Ct. at 2770-71 (Rehnquist, C.J., plurality opinion).

tencing process. The decision to impose death is a communal, moral judgment: it "express[es] the conscience of the community on the ultimate question of life or death."[35] The Court has repeatedly observed that capital sentences rest on countless factors and involve "uniquely human judgments that defy codification." *McCleskey v. Kemp*, 481 U.S. at 302. These sorts of decisions are inherently difficult subjects of appellate review.[36] For these reasons, many commentators have observed that appellate review of capital sentencing decisions cannot play a central role in contributing to the reliability of the overall sentencing process.[37]

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[35] *Witherspoon v. Illinois*, 391 U.S. 510, 519 (1968). *See also California v. Brown*, 479 U.S. 538, 545 (1987) ("*Lockett* and *Eddings* reflect the belief that punishment should be directly related to the personal culpability of the criminal defendant."); *Sumner v. Shuman*, 483 U.S. 66, 76 n.5 (1987) (quoting *California v. Brown*, 479 U.S. 538) ("[P]unishment should be directly related to the personal culpability of the criminal defendant. Thus, the sentence imposed at the penalty stage should reflect a reasoned *moral* response to the defendant's background, character, and crime."); Weisberg, *Deregulating Death*, 1983 Sup. Ct. Rev. 305, 321 n.69 ("a judge or jury's decision to kill is an intensely moral, subjective matter that seems to defy the designers of general formulas for legal decisions").

[36] *See Zant v. Stephens*, 462 U.S. at 883; *Id.* at 902 (Rehnquist, J., concurring) ("sentencing decisions rest on a far-reaching inquiry into countless facts and circumstances and not on the type of proof of particular elements that returning a conviction does"); *Barclay v. Florida*, 463 U.S. 939 (1983); *California v. Ramos*, 463 U.S. 992 (1983) ("myriad" factors); White, *supra* at 865-66 (". . . the death penalty determination is fundamentally different from the guilt determination. The guilt determination is essentially concerned with findings of fact; the penalty determination, on the other hand, is essentially a discretionary judgment whether the defendant should be sentenced to life imprisonment or death. . . . Determining whether an aggravating circumstance is present is generally quite simple.").

[37] Dix, *Appellate Review of the Decision to Impose Death*, 68 Geo. L.J. 97, 123, 141, 158, 159-60 (1979) ("the failure of appellate review reflects the impossibility of the underlying task");

Third, and even more importantly for this case, the likelihood that appellate review will enhance sentencing reliability is especially remote where the defendant refuses to cooperate with—and actively opposes—"his" defense counsel. Even at the appellate level, a client's refusal to cooperate significantly affects a lawyer's ability to marshal and present a case, while the defendant's affirmative approval of his capital sentence necessarily and properly will affect the judgment of any tribunal.

And most fundamentally, appellate review is at bottom a procedural means to the ultimate Eighth Amendment end of ensuring that capital sentences are imposed only in appropriate cases. *See Woodson v. North Carolina*, 428 U.S. at 305. It bears emphasis that, assuming competency, it is the capital defendant who will often know his crimes and personal culpability far better and more concretely than any appellate court of law can grasp. Where the defendant freely and voluntarily accepts a capital sentence imposed by the trial court, he himself provides compelling evidence that the sentencing decision is appropriate.[38] Put differently, a competent defendant's voluntary conclusion that *his own* capital sentence is not "cruel" must surely be entitled to substantial weight in any Eighth Amendment analysis.

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The Court has long respected the freedom of the individual States to fashion local solutions to moral and political questions like those presented in this case. Even

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Weisberg, *supra* at 321, n.69 ("Although the [*Gregg*] opinion lauds the availability of appellate review, the informality of the procedures in the penalty trial ensures that there is not a great deal of legal error for the appellate court to correct.").

[38] *Cf. Brady v. United States*, 397 U.S. at 748 ("Central to the plea and the foundation for entering judgment against the defendant is the defendant's admission in open court that he committed the acts charged in the indictment. He thus stands as a witness against himself.").

in the *Gregg-Jurek-Proffitt* trilogy, the plurality abjured any intention of promulgating some model capital-sentencing procedure.[39] And more recently, the Court has emphasized its "unwilling[ness] to say that there is any one right way for a State to set up its capital sentencing scheme." [40]

This unwillingness to dictate particular procedures for State capital sentencing statutes reflects fundamental principles of federalism.[41] It is, of course, hornbook law that the Court "presume[s] the validity" of state law and that "a heavy burden rests on those who would attack the judgments of the representatives of the people." *Gregg v. Georgia*, 428 U.S. at 175. More recently, the Court has emphasized the importance of "[c]onsiderations of federalism, as well as respect for the ability of a legislature to evaluate, in terms of a particular State, the moral consensus concerning the death penalty and its social utility as a sanction." *McCleskey v. Kemp*, 481 U.S. at 302 (quoting *Gregg v. Georgia*, 428 U.S. at 179-80).

There are compelling reasons for deferring to the judgments of individual States in the present case. As we have explained above, a constitutionally imposed rule of mandatory appellate review would require States to abandon a number of significant public policies served by waivers of appellate review. At the same time, such a rule would at best offer only a marginal and uncertain enhancement in sentencing reliability. In these circumstances, it would be an unjustified departure from our historic respect for individual autonomy to interpret

[39] *Gregg v. Georgia*, 428 U.S. at 195 ("We do not intend to suggest that only the above-described procedures would be permissible under *Furman*.").

[40] *Spaziano v. Florida*, 468 U.S. 447, 464 (1984); *McCleskey v. Kemp*, 481 U.S. at 302.

[41] *See Furman v. Georgia*, 408 U.S. at 417-18 (Powell, J., dissenting); *Id.* at 465-70 (Rehnquist, J., dissenting); R. Berger, *Death Penalties: The Supreme Court's Obstacle Course* 5-6 (1982).

the Eighth Amendment—originally framed to protect individuals from *federal* governmental coercion—to forbid an individual from voluntarily exercising a liberty guaranteed by State law.[42]

II. THE CONSTITUTIONALITY OF WAIVERS OF APPELLATE REVIEW OF CAPITAL SENTENCES IS NOT ALTERED BY THE CURRENT PRACTICES IN VARIOUS STATES.

Perhaps because the validity of the Arkansas capital sentencing process under ordinary methods of constitutional analysis is so clear, petitioner places principal reliance upon the supposed "fact" that 36 out of 37 States have rejected Arkansas' approach to waivers of appellate review. Even accepting petitioner's characterization of the capital-sentencing statutes of the several States,[43] a mechanical tally of State laws is of virtually no constitutional significance in the present case. In making use of

[42] This case presents the question whether the Eighth Amendment *requires* States to provide mandatory appellate review of capital sentences; it does not present the question whether the Eighth Amendment *forbids* States from requiring mandatory appellate review. We think it would be clear, however, that a State's legislative enactment of a nonwaivable appeal for the benefit of capital defendants would be consistent with the Eighth Amendment. *See North Carolina v. Alford*, 400 U.S. 25, 38-39 & n.11 (1970) ("A criminal defendant does not have an absolute right under the Constitution to have his guilty plea accepted by the court."); *Singer v. United States*, 380 U.S. 24 (1965). *Compare Faretta v. California*, 422 U.S. 806 (1975).

[43] In point of fact, the courts of only 7 States have actually considered whether local law forbids waivers of appellate review. It may well be that the courts of all 36 States, except Arkansas, would ultimately require mandatory appellate review over a defendant's opposition. But particularly in light of our long-standing commitment to individual autonomy and responsibility, this result ought not lightly be presumed from even arguably ambiguous statutory language. Nor should it necessarily be assumed that mandatory appellate review would be consistent with State constitutional guarantees of individual liberties. Responsibility for the interpretation of State laws lies with State courts, and the federal courts are properly reluctant to intrude upon this domain.

tallies of State statutes, this Court's decisions draw a clear distinction between cases involving *substantive* Eighth Amendment rights and those involving *procedural* Eighth Amendment safeguards. Thus, the Court has on several occasions relied upon a tally of State statutes to strike down capital punishment for certain offenses or defendants as cruel and unusual.[44] In contrast, where procedural safeguards are involved, the Court has relied on its own constitutional analysis, upholding laws even when the overwhelming majority of the States follow different procedures.[45]

The foregoing distinction between substantive and procedural issues is fully consistent with the relative institutional competence of the federal courts in resolving different types of legal questions. The judiciary's competence is particularly great in assessing the fairness and efficacy of procedural protections.[46] In contrast, there is considerably greater question about the ability of the federal courts to pass judgment upon the legitimacy of substantive rules, at least without meaningful Constitutional guidance.[47] And finally, it would be unusual, and troubling, to hold that the Bill of Rights' entrenched protections for individual freedom are somehow dictated by a poll of the statutes currently prevailing in a majority of the several states.

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[44] *E.g., Thompson v. Oklahoma*, 108 S. Ct. 2687 (1988) (death penalty for 15-year old); *Enmund v. Florida*, 458 U.S. 782 (1982) (death penalty for persons not involved in murder); *Coker v. Georgia*, 433 U.S. 584 (1977) (death penalty for rape of adult woman).

[45] *See Pulley v. Harris*, 465 U.S. at 71 (Brennan, J., dissenting) (proportionality review, which, as dissent observed, was used in more than 30 States, is not required by Eighth Amendment); *California v. Ramos*, 463 U.S. 992 (jury instructions mentioning possibility of parole, condemned in 25 of 28 States, not violative of Eighth Amendment); *Spaziano v. Florida*, 468 U.S. 447 (judge's override of jury's refusal to impose death penalty, prohibited in 33 of 37 States, does not violate Eighth Amendment).

[46] J. H. Ely, *Democracy and Distrust* 21 (1980).

[47] *See Lochner v. New York*, 198 U.S. 45 (1905).

III. PETITIONER LACKS STANDING TO INTERFERE WITH THE THE ARKANSAS CAPITAL SENTENCING PROCESS.

Claims that the Constitution has been violated, no matter how deeply-held, do not necessarily confer jurisdiction upon the federal courts. Rather, the federal judicial power is limited by Article III to actual cases and controversies. The standing requirements of Article III require a plaintiff to show, at a minimum, that he has suffered "a distinct and palpable injury to himself," which "fairly can be traced to the challenged action" and which "is likely to be redressed if the requested relief is granted."[48] Petitioner Jonas Whitmore, a convicted murderer and death row inmate, advances several alternative theories in support of his claim to act on behalf of respondent Ronald Gene Simmons. As we show below, none of these theories is plausible.

Petitioner suggests first that he has standing by virtue of his "direct and substantial interest" in having Simmons' crimes included in the Arkansas "data base against which his crime is compared." Brief for Petitioner at 21. This claim plainly fails to satisfy Article III's minimum requirement that petitioner have suffered some distinct and palpable injury as a result of the constitutional violation he alleges. Jonas Whitmore was not sentenced to death because Ronald Gene Simmons waived appellate review. He was sentenced to death because he robbed and brutally murdered an innocent woman.[49] It is entirely

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[48] *Simon v. Eastern Kentucky Welfare Rights Org.*, 426 U.S. 26, 38 (1976); *Valley Forge Christian College v. Americans United for Separation of Church & State, Inc.*, 454 U.S. 464, 472 (1982).

[49] *Whitmore v. State*, 296 Ark. 308, 316, 756 S.W.2d 890, 895 (1988). Whitmore filed an appeal from his conviction which was automatically accepted and reviewed by the Arkansas Supreme Court. In confirming the lower court verdict, the Arkansas Supreme Court made a comparative review of the "wickedness, inhumanity, and heinousness of [Whitmore's] capital case with other capital

speculative to suggest that adding one case to the Arkansas capital sentence data bank would affect the validity of this judgment. Petitioner's claim offers nothing more than "the remote possibility, unsubstantiated by allegations of fact, that [his] situation might have been better had [Simmons] acted otherwise." [50]

Second, petitioner asserts that he should be excepted from the traditional "rules of practice" governing standing because he is an Arkansas citizen who shares a weighty "societal right" not to have an execution carried out arbitrarily and capriciously in his State. This Court's Article III decisions completely foreclose petitioner's argument.[51] "The federal courts have abjured appeals to their authority which would convert the judicial process

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cases." *Whitmore*, 756 S.W.2d at 895. The court held that the robbery-murder of Whitmore's victim was similar to the robbery-murders in two other recent state cases also resulting in the imposition of the death penalty.

[50] *Warth v. Seldin*, 422 U.S. 490, 507 (1975). *See also Linda R.S. v. Richard D.*, 410 U.S. 614, 618 (1973) (claim by mother that prosecution of child support statute against father would result in payment of child support is "only speculative"); *Simon*, 426 U.S. at 41 (1976) (claim that favorable tax ruling encouraged hospitals not to treat indigents was not "fairly . . . traced to the challenged action of the defendant"); *Franz v. Lockhart*, 700 F. Supp. 1005, 1010 (E.D. Ark. 1988).

In addition, any injury suffered by Whitmore is not "fairly traceable" to Simmons' waiver of appellate review. Rather, it is traceable to Arkansas' practice of excluding sentences which are not appealed from its comparative review data base. Arkansas is, of course, not required to include any particular cases within its data base, nor even to provide proportionality review. *Pulley v. Harris*, 465 U.S. 37. There is no reason to believe that, if mandatory appellate review of capital sentences were constitutionally required, Arkansas would include cases where the defendant supports his sentence.

[51] *See Valley Forge Christian College*, 454 U.S. at 482-87; *Flast v. Cohen*, 392 U.S. 83 (1968); *Schlesinger v. Reservists Comm. to Stop the War*, 418 U.S. 208 (1974); *United States v. Richardson*, 418 U.S. 166, 179-80 (1974).

into 'no more than a vehicle for the vindication of the value interests of concerned bystanders.' " [52]

Finally, petitioner claims standing as "next friend" of Ronald Gene Simmons. At a minimum, two requirements must be met for next friend standing. First, the person on whose behalf the plaintiff acts must suffer from some disability that prevents a direct action. Second, the petitioner must demonstrate that he is in fact a "next friend." *See Singleton v. Wulff*, 428 U.S. 106, 115 (1976); *Davis v. Austin*, 492 F. Supp. 273 (N.D. Ga. 1980).

There is no indication at all in this case that Simmons cannot act competently on his own behalf. Indeed, Simmons has had three separate competency evaluations in which he was repeatedly found competent to fully understand the nature and effect of his waiver of appellate review and to have made a "knowing and intelligent waiver of any and all rights to appeal his sentence." *Simmons v. State*, 298 Ark. 193, 766 S.W.2d 422, 423, *cert. granted*, *Whitmore v. Arkansas*, 109 S. Ct. 3240 (1989). Simmons' undeniable competency should foreclose any claim of next friend standing by petitioner Whitmore. This at least was the Court's conclusion in both *Gilmore v. Utah*, 429 U.S. 1012 (1976), and *Lenhard v. Wolff*, 443 U.S. 1306 (stay granted) and 444 U.S. 807 (1979).[53]

Indeed, even if the Eighth Amendment affirmatively prohibits Simmons from waiving appellate review, there

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[52] *Valley Forge Christian College*, 454 U.S. at 473 (quoting *United States v. SCRAP*, 412 U.S. 669, 687 (1973)).

[53] In *Gilmore* the Court allowed the defendant's execution to go forward on the grounds that he had "made a knowing and intelligent waiver of any and all federal rights he might have asserted after the Utah trial court's sentence was imposed." 429 U.S. at 1013. Four Justices went further and expressly concluded that Gilmore's voluntary and competent waiver barred "next friend" standing. *Id.* at 1016 (Burger, C.J., concurring); *id.* at 1017 (Rehnquist, J., concurring).

is no basis for third party standing in this Court.[54] Quite apart from the Bill of Rights, Article III itself "reflects a due regard for the autonomy of those persons likely to be most directly affected by a judicial order." *Valley Forge Christian College v. Americans United For Separation of Church & State, Inc.*, 454 U.S. 464, 473 (1982). Put differently, Article III's standing requirement serves "to put the decision as to whether review will be sought in the hands of those who have a direct stake in the outcome." *Sierra Club v. Morton*, 405 U.S. 727, 740 (1972).

Unlike some other capital defendants who have waived appellate review,[55] Simmons continues to urge affirmance of his sentence in this Court. Allowing next friend standing in these circumstances trenches significantly upon Simmons' autonomy: regardless of how "worthy and high minded the motive of 'next friends' may be, they inevitably run the risk of making the actual defendant a pawn to be manipulated on a chessboard larger than his own case." *Lenhard v. Wolff*, 443 U.S. at 1312. Article III's standing requirement serves in part to prevent precisely such results.

Even assuming that Simmons is deemed legally incompetent to defend his waiver, Whitmore has plainly failed

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[54] In the First Amendment context, the Court has allowed third party standing where the person "actually engaged in the protected activity [may] . . . refrain from engaging further in the protected activity" rather than risk punishment. *Secretary of State v. Joseph H. Munson Co.*, 467 U.S. 947, 956 (1984). Simmons is in no way deterred from litigating here on his own behalf. Rather, he simply has expressed his intent to waive his right of appeal. Likewise, this is not a case where it is "difficult if not impossible for the persons whose rights are asserted to present their grievances before any court." *Barrows v. Jackson*, 346 U.S. 249, 257 (1953). Simmons has instead merely refused to assert his right to appeal.

[55] *E.g., Evans v. Bennett*, 440 U.S. 1301, *cert. denied*, 440 U.S. 987 (1979); *Smith v. Armontrout*, 812 F.2d 1050, 1052 (8th Cir.), *cert. denied*, 483 U.S. 1033 (1987).

to meet the relational requirement for next friend standing. Appropriate persons to maintain next friend actions are "close relatives, such as a parent, spouse, or sibling, who maintain a close personal relationship with the aggrieved." [56] Petitioner Whitmore's only claimed relationship to Simmons is as a fellow death row inmate. This in no way satisfies the historic requirement of a close and enduring personal relationship.

CONCLUSION

"One of society's most basic tasks is that of protecting the lives of its citizens and one of the most basic ways in which it achieves the task is through criminal laws against murder." *McCleskey v. Kemp*, 481 U.S. at 297 (quoting *Gregg v. Georgia*, 428 U.S. at 226 (White, J., concurring)). Tragically, our society has in recent decades fundamentally breached its obligation to protect the lives of American citizens. Americans of all walks and stations of life have been subjected to a brutal, ever-escalating tide of violence and murder that is simply incomprehensible: there were 16,689, 17,545 and 19,527 reported murders in the United States in 1984, 1985 and 1986—a toll of 50 human lives every single day of the year.[57] The human and spiritual losses that these figures reflect cannot too long be endured by a civilized people. Here, a jury and judge of the State of Arkansas, acting pursuant to a presumptively valid State statute, have concluded that the crimes committed by Ronald Gene Simmons are beyond the endurance of civilized society. Simmons has voluntarily and competently agreed with that judgment. Nothing in the Eighth Amendment forbids this choice.

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[56] *Franz v. State*, 296 Ark. 181, 754 S.W.2d 839, 841 (1988) (quoting *Davis v. Austin*, 492 F. Supp. 273, 275 (N.D. Ga. 1980)).

[57] U.S. Department of Commerce, *Statistical Abstract of the United States 1988* 160.

For the foregoing reasons, the decision of the Supreme Court of Arkansas should be affirmed.

Respectfully submitted,

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